A

SGS Singapore (Pte) Ltd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–14–2 OF 1998
KC VOHRAH J
10 MARCH 2000

B

Revenue Law *— Income tax — Double taxation — Services provided outside Malaysia — Whether income and profits derived from services could be excluded from taxation — Avoidance of Double Taxation and Prevention of Fiscal Evasion Agreement, art II(1)(1)*

C

D

E

The appellant, a company incorporated and tax resident in Singapore was awarded a contract by one PCSB for the provision of third party inspection and expediting services. Most of these services (98%) were provided by the appellant outside of Malaysia and the rest was provided in Malaysia by one of the appellant's affiliate company. The respondent imposed taxes on the appellant for the years of assessment 1984 and 1985. The appellant claimed relief under art iv of the Avoidance of Double Taxation And Prevention of Fiscal Evasion Agreement ('DTA') and appealed to the Special Commissioners. The dispute was whether the appellant has derived the income and profits of his services within the meaning of art II(1)(l) of the DTA. The special commissioner ruled that art iv was not applicable as the appellant was in essence exercising 'management control or supervision' of the activities of another enterprise and would therefore fall under the definition of art II(1)(l) of the DTA. Thus, the appellant could not claim any relief under art IV of the DTA. The appellant appealed against the special commissioner's decision.

F

Held, allowing the appeal:

(1) The special commissioner had erred in its interpretation of the DTA and further failed to read the contract as a whole in deriving its decision (see p 235E). The contract showed that the appellant was nothing more than an independent contractor providing inspection and expediting services to PCSB (see p 239E).

G

(2) The special commissioner further failed to distinguish between 'project management services' which was not carried out by the appellant and 'inspection and expediting services' which was carried out by the appellant (see p 240C–D).

H

(3) Various provisions of the contract showed that the appellant was not a project management contractor exercising 'management control or supervision' of PCSB (see p 235I).

[Bahasa Malaysia summary

I

Perayu, sebuah syarikat yang ditubuhkan dan penetap bercukai di Singapura telah diberikan satu kontrak oleh PCSB untuk penyediaan khidmat pemeriksaan dan pelancaran pihak ketiga. Kebanyakan

khidmat ini (98%) disediakan oleh perayu di luar Malaysia dan yang lainnya disediakan di Malaysia oleh salah satu daripada syarikat gabungan pihak perayu. Penentang telah mengenakan cukai ke atas perayu untuk tahun-tahun taksiran 1984 dan 1985. Perayu menuntut relief di bawah perkara iv Persetujuan Pengelakan Pencukaian Berganda dan Pencegahan Pengelakan Kewangan ('DTA') dan merayu kepada Pesuruhjaya Khas. Pertikaian adalah sama ada perayu telah memperolehi pendapatan dan keuntungan untuk perkhidmatannya dalam lingkungan maksud perkara II(1)(1) DTA. Pesuruhjaya Khas memutuskan bahawa perkara IV tidak terpakai kerana perayu sebenarnya melaksanakan 'management control or supervision' kegiatan sebuah lagi syarikat dan dengan itu diliputi oleh tafsiran perkara II(1)(1) DTA. Justeru itu perayu tidak boleh menuntut apa-apa relief di bawah perkara IV DTA. Perayu merayuterhadap keputusan pesuruhjaya khas.

Diputuskan, membenarkan rayuan tersebut:

(1) Pesuruhjaya khas terkhilaf dalam tafsiran beliau ke atas DTA dan selanjutnya gagal membaca kontrak secara keseluruhan dalam mencapai keputusan beliau (lihat ms 235E). Kontrak menunjukkan bahawa perayu hanyalah sekadar seorang kontraktor bebas yang menyediakan khidmat pemeriksaaan dan pelancaran kepada PCSB (lihat ms 239E).

(2) Pesuruhjaya khas selanjutnya gagal membezakan di antara 'khidmat pengurusan projek' yang tidak dilaksanakan oleh perayu dan 'khidmat pemeriksaan dan pelancaran' yang dijalankan oleh perayu (lihat ms 240C–D).

(3) Pelbagai peruntukan kontrak tersebut menunjukkan bahawa perayu bukanlah seorang kontraktor pengurusan projek yang melaksanakan 'management control or supervision' PCSB (lihat ms 235I).]

Notes

For cases on double taxation, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2059–2070.

Cases referred to

Barton v FizGerald (1812) 15 East 530 (refd)

Chamber Colliery Co v Twyerould [1915] 1 Ch 268 (refd)

Chua Lip Kong v DGIR [1982] 1 MLJ 235 (refd)

Edwards HM Inspector of Taxes v Bairstow & Harrison (1955) 36 TC 207 (refd)

Lower Perak Co-opertive Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713 (refd)

Legislation referred to

Income Tax Act 1967 ss 4A, 132(1)

S Woodhull & Anand Raj (Shearn Delamore & Co) for the appellant.
Hazlina Hussain (Legal Officer) for the respondent.

KC Vohrah J: Article IV(1)(a) of the agreement between Malaysia and Singapore for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income ('the DTA') operates to afford relief to 'Singapore enterprises' from being taxed twice (ie in Malaysia and in Singapore) on the 'income or profits' of such an enterprise derived from Malaysia. Article IV(1)(b) in turn provides relief from double taxation in the event that a 'Malaysian enterprise' derives 'income or profits' from Singapore.

The Director-General of Inland Revenue ('the respondent') under the Income Tax Act 1967 ('the Act') imposed tax of RM94,477.95 and RM439,836.49 for the years of assessment 1984 and 1985, respectively, on the appellant disagreeing with the appellant that the appellant, a company incorporated and tax resident in Singapore and not carrying business in Malaysia or having a permanent establishment in Malaysia, by virtue of the DTA, did not receive income chargeable to Malaysian income tax.

The appellant appealed to the Special Commissioners.

The Special Commissioners decided in favour of the respondent, and thus this case stated.

In this case stated, the appellant has argued that the Special Commissioners of Income Tax have been wrong in their decision on the ground that they erred on a mixed question of law and fact.

On the issue of law, the appellant argues that the Special Commissioners have wrongly disallowed the relief provided by art IV read in the context of art II(1)(l) of the DTA which relates to the meaning of 'income and profits' (which is not chargeable to tax under the DTA) and what is excluded from 'income or profits'. And the argument is tied to the issue of facts; the attack is against the findings of fact which the appellant says ignore the evidence that was disclosed and which show that the payments received are included within the meaning of 'income or profits' under the DTA and therefore not chargeable to tax.

The DTA is gazetted under s 132 of the Act and at the relevant period the DTA had effect in relation to tax under the Act notwithstanding anything in any written law (see s 132(1) of the Act).

The appellant, a company incorporated and tax resident in Singapore, had appealed to the Special Commissioners of Income Tax against tax imposed by the respondent under the Act in the sum of RM94,477.95 for year of assessment 1984 and the sum of RM439,836.49 for year of assessment 1985 in respect of payments received by the appellant for 1984 and 1985 from Malaysia.

The Special Commissioners had to determine whether having regard to the DTA the relevant payments are chargeable to tax under s 4A of the Act.

The Special Commissioners held that the relevant payments were properly subject to tax under s 4A of the Act and rejected the appeal. This was leased on their 'firm finding of fact that the relevant payments constituted income of a category excluded from the definition of income which is not taxable in Malaysia under art IV of the agreement' (ie the DTA).

The appellant claims relief under art IV of the DTA and it reads as follows:

> The income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment in Malaysia.

Relief from income tax for the appellant is available under the said art IV if three conditions are met:

(1) that the appellant is a 'Singapore enterprise';

(2) that the appellant does not 'carry on business' through a 'permanent establishment in Malaysia'; and

(3) the appellant derives 'income or profits' from Malaysia.

It is an agreed fact that the appellant is a 'Singapore enterprise' and it is also an agreed fact that the appellant does not 'carry on business' in Malaysia and does not have a 'permanent establishment' in Malaysia.

What is in dispute is whether the appellant derived 'income or profits' from Malaysia within the meaning of art II(1)(l) of the DTA.

The appellant was awarded a contract ('the contract') by Petronas Carigali Sdn Bhd (PCSB) for the provision of 'third party inspection and expediting services' for the Peninsular Malaysia (Offshore) Gas Project ('the project'). This meant that whenever PCSB required certain equipment and machinery (largely purchased from abroad) inspected for their quality and/or to expedite of the delivery of the said equipment and machinery (intended for use in connection with the project), the appellant's services could be called upon.

Ninety eight per cent of these services were provided by the appellant outside Malaysia. Two per cent of such services was provided to PCSB in Malaysia by its Malaysia affiliate, Petrotechnical, a separate legal entity. These are findings of fact made by the Special Commissioners and set out in para 6.4 of the case stated.

Further, and as confirmed by para 6.5 of the case stated, PCSB withheld tax in the amount of 15% on all payments made by PCSB to the appellant for services rendered under the contract and paid the same over to the respondent. These payments were made in consideration of all services ('inspection and expediting delivery of equipment') provided by the appellant to PCSB, whether in Malaysia or outside Malaysia. However, only 2% of the services was performed in Malaysia, not by the appellant but by a separate legal entity (Petrotechnical) as stated earlier.

A The respondent made a partial refund of the tax withheld by PCSB.

I will now deal with the dispute whether the appellant derived 'income or profits' within the meaning of art II(1)(l) of the DTA which reads:

> The terms 'income or profits of Malaysian enterprise' and 'income or profits of a Singapore enterprise' do not include rents or royalties in respect of
B literary or artistic copyrights, motion picture films or of tapes for television or broadcasting or of mines, oil wells, quarries or other places of extraction of natural resources or of timber or forest produce, or *income* in the form of dividends, interest, rents, royalties or fees or other remuneration *derived from the management, control or supervision of the trade, business or other activity of another enterprise* or concern or remuneration for labour or personal services
C or income derived from the operation of ships or aircraft. (Emphasis added.)

The Special Commissioners ruled that art IV(1)(a) of the DTA was not applicable in the case by operation of art II(1)(l) of the DTA as the services provided by the appellant under the contract between the appellant and PCSB entered into on 18 February 1982 were 'in the nature of technical
D management or supervision to ensure that the materials and equipment procured by PCSB for its project were produced by the vendors in accordance with specification and were delivered on a timely basis'.

The Special Commissioners continued (para 10.11 of the case stated):

> In short the services are for supervising the activities of another enterprise. It follows that the relevant payments which were paid as fees of remuneration
E would fall within the meaning of 'fees or other remuneration derived from the management, control or supervision of the trade, business or other activity of another enterprise or concern' as used in the exclusionary definition of the term 'income or profits of a Singapore enterprise' in para 1(1) of art II.

The Special Commissioners further stated:

F > In other words, the relevant payments would be excluded from the meaning of the term 'income or profits of a Singapore enterprise' appearing in art IV of the agreement. Consequently, art IV would not have the effect of rendering the relevant payments not chargeable to tax in Malaysia even though the appellant had not carried on business in Malaysia through a permanent establishment situated in Malaysia. In the circumstances it would now appear
G to be irrelevant whether or not the appellant had a permanent establishment in Malaysia: the entire art IV is inapplicable because the relevant payments have been excluded by the art II definition from the meaning of the term 'income or profits of a Singapore enterprise' as used in the agreement.

The Special Commissioners inferred that the 'third party inspection and expediting services' provided by the appellant amount to 'the management,
H control or supervision of the trade, business or other activity' of PCSB, an inference of mixed law and fact.

Inferences of mixed law and fact are amenable to review by the High Court as I shall discuss later, but for the moment we shall turn to how the Special Commissioners came to their inferences. They stated (at para 10.10
I of the case stated):

> ... The payments were derived from the inspection and expediting services provided under the contract by the appellant to PCSB for the project and from

> the documentary and oral evidence adduced before us the services were inter alia for the pre-shipment inspection of materials and equipment at vendors' premises in 13 countries, liaison and co-ordinating activities pertaining to the inspection services, monitoring the vendors' production schedules and recommending remedial action on production delays and problems, preparing and submitting daily inspection reports and expediting services to ensure timely delivery of materials and equipment from the vendors' promises to the project site. The fees for these technical services were not incorporated into the price of the materials and equipment purchased by PCSB from the vendors, and it is obvious to us that these services were activities which would have to be performed by PCSB itself as part of its technical management function had it not contracted them out to be performed on its behalf by the appellant or some other third party. Quality — testing, production monitoring, recommending remedial action on delays and problems, regular reporting, expediting, production and delivery — these are all activities which are normally carried out in connection with the technical management function of any organisation. However, PCSB chose not to carry out these activities on its own but to contract them out as services to be performed on its behalf by the appellant ...

When can the High Court question the decision of the Special Commissioners?

In *Chua Lip Kong v DGIR* [1982] 1 MLJ 235 at p 236 Lord Diplock in delivering the decision of the board set out the nature of the findings of the Special Commissioners which could be challenged on appeal. In this context, the following are the different kinds of findings that could be made by the Special Commissioners, namely:

(a) findings of primary fact which are usually admitted by the parties or proved by either of them to the satisfaction of the Special Commissioners; and

(b) inferences drawn from such primary facts and there are two such types of inferences, namely:

  (i) inferences of fact; or

  (ii) inferences of mixed fact and law.

In 1955, Viscount Simonds in the House of Lords' case of *Edwards HM Inspector of Taxes v Bairstow & Harrison* (1955) 36 TC 207 held (at p 224):

> ... For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

Lord Radcliffe formulated the following *locus classicus* (at p 229) after discussing some English and Scottish cases on the matter:

> ... If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the

A distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the* B *relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law.* I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which C the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to D occur. (Emphasis added.)

Edgar Joseph Jr SCJ, in the Supreme Court decision of *Lower Perak Co-opertive Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 has reaffirmed these principles.

E The appellant has submitted that the Special Commissioners have erred:

(a) in law, by failing to interpret the contract and the DTA (ie arts II(1)(l) and (IV)) in accordance with established principles of interpretation; and

F (b) in law, by failing to consider art XII(4) of the DTA; and

(c) in drawing inferences of mixed law and fact in regard to the nature of the appellant's services provided under the contract; and/or

(d) in their findings and/or inferences of fact in regard to the nature of the appellant's services provided under the contract, which were G unsupported by the evidence before them and/or were based on a view of the facts that could not reasonably be entertained.

With respect, I did not see any attempt on the part of the Special Commissioners to examine the contract made between PCSB and the appellant to come to a conclusion as to what the role of the appellant was in H the contract read as a whole. PCSB itself had a project management team which was in full control of the project and to whom the appellant answered. The contract also showed that the appellant was not even an exclusive contractor; PCSB could ask another contractor to provide services and the appellant was not able to demand work from PCSB (see art 33 of the contract).

I Various provisions of the contract were referred to by the appellant which taken together show that the appellant was not a project management contractor exercising 'management, control or supervision' of PCSB's trade

or business within the meaning of art II(1)(l) of the DTA. For completeness of this decision, I am not abbreviating the full analysis of the provisions made by the appellant,the provisions which are referred to in the agreed bundle of documents ('ABD'), marked 'A' in the case stated) and the reference to Carigali is a reference to PCSB:

(a) Page 5 ABD: The appellant is clearly described as a contractor and not a manager.

(b) Pages 7, 8, 9 ABD: the Carigali project management team (PMT) carried out the functions of the project manager. This shows that 'management, control or supervision' (within the meaning of art II(1)(l) of the DTA) of Carigali's business or trade was not carried out by the appellant and that the exclusion art IV of the DTA should not apply:

'5 'Contractor' shall mean the company having a contract with Carigali to execute the services set forth in the agreement including all exhibits, references and documents annexed thereto.

6 Carigali PMT shall mean THE Carigali Project Management Team for the Peninsular Malaysia (Offshore) Gas Project.

18 'Project Management Team' ('PMT') means the managerial, technical, administrative and clerical personnel furnished by Carigali.'

(c) Page 11 ABD, art 2.2: again this shows that Carigali was in control of the project and not the appellant. It cannot be said that the appellant exercised 'management, control or supervision' over the project:

'Article 2 — Purpose of contract

2.1 Purpose

The purpose of this contract is to define the conditions and terms hereafter set forth under which the contractor shall perform the Services herein.

2.2 Scope of work

The Scope of work under this contract shall be as described in exhibit II, annexed hereto and made a part thereof.

Carigali may at any time increase or decrease the scope of work and in such case the Schedule will be adjusted accordingly.'

(d) Page 12 ABD, art 3.3 and p 13 ABD, art 4.1: also show that Carigali itself exercised 'management, control or supervision' of the project (within the meaning of art II(1)(l) of the DTA):

'3.3 Carigali reserves the right to extend the contract for a further period of time to be mutually agreed upon by both parties on terms and conditions to be mutually agreed upon by both parties.'

(e) Page 16, art 7.1.3: identifies Carigali's own project director as being the person responsible for paying for the services rendered to Carigali by the appellant. This shows that the project director exercised 'management, control or supervision' of the project.

(f) Page 20 ABD, art 9.2: the appellant is denied any authority to enter negotiations without Carigali's written approval:

'9.2 Contractor shall not, under any circumstances, enter into negotiations with any governmental authority or agency to develop acceptance to exemption, compositions, variations or revision to law

in connection with the contract without Carigali's prior written approval.'

(g) Page 21 ABD, art 9.5: again confirms Carigali's 'management, control or supervision' as the appellant is obligated to follow Carigali's rules and regulations:

'9.5 Contractor shall ensure that all its employees, agents and subcontractors comply with Carigali's rules and regulations, practices and requirements in the area of Carigali's operations.'

(h) Pages 32-33 ABD, art 14: patent rights vest with Carigali and not the appellant.

(i) Page 42 ABD, art 18: clearly confirms that the appellant is an independent contractor and not a project manager. Therefore the appellant cannot possibly fall within the exclusion to art IV DT.A as someone who 'manages, controls and supervises' Carigali's business (within the meaning of art II(1)(l) of the DTA). Article 18 also established that the appellant cannot enter into any binding commitment on Carigali's behalf:

'Article 18 — Independent contractor

For the purpose of the contract, contractor shall be, and shall be deemed to be an independent contractor and not the agent or employee of Carigali. contractor shall have no authority to make any statements, representations or commitments of any kind or to take any action which shall be binding upon Carigali, except as provided for herein or authorized in writing by Carigali.'

(j) Page 43 ABD, art 19: provides that Carigali's representative (ie the project director of the project management team), and not the appellant, is clearly in control and has the final say on numerous issues:

'Article 19 — Carigali's representative

19.1 Carigali's representative, whose designation is project director, project management Team, Peninsular Malaysia Offshore Gas project, represents Carigali with respect to services performed by contractor. Carigali's representative shall be Hj Vanhatten with an office located at Lot TF 07B, Bukit Bintang Plaza, Jalan Bukit Bintang, Kuala Lumpur.

19.2 Carigali's representative or his designate shall at all times have access to work performed under services including timesheets, reports, logs, specifications, calculations and drawings without limitation. Carigali's representative shall have the right to make final decision on all questions involving the interpretation of the scope of work, and any other specifications, drawings and documents furnished by Carigali to contractor.

19.3 Carigali's representative shall have the right to reject any part of services which does not conform to the contract and to decide on all questions relating to the performance of services.'

(k) Page 44 ABD, art 20.2: Carigali can insist that the appellant's employees be removed.

(l) Page 48 ABD, art 24.1: Carigali has the right to inspect the appellant's (ie the contractor's) work. This function is in the nature of 'management,

control or supervision' (within the meaning of art II(1)(l) of the DTA) and it is exercised by Carigali and not the appellant:

'Article 24.1

Carigali shall have the right at any and all times to inspect the services and, within the terms hereof, to require alterations and corrections to be made to the service. Such inspection, however, shall in no way relieve contractor from its obligation to fulfil all requirements of the services or this contract.'

(m) Page 52 ABD, art 26: the appellant cannot take any actions on Carigali's behalf. Again, this shows that the appellant has no 'management, control or supervision' of Carigali's business.

'26.1 Contractor shall take no action on behalf of Carigali in the performance of Services hereunder that would subject either party to liability or penalty under any laws, rules, regulations or decrees of any governmental authority.

26.2 Contractor shall obtain written approval from Carigali prior to making any publicity release or announcements regarding services or contract. Contractor shall also require its subcontractors, vendors or subconsultants to comply with this article.

26.3 Contractor shall notify Carigali promptly upon discovery of any instance where contractor or its subcontractors have not complied with the requirements of this article.'

(n) Page 61 ABD, art 33: the appellant did not even have an exclusive contact. This too shows that it could not have 'management, control or supervision' of Carigali's business as Carigali could decide to contract the inspection and expediting services performed by the appellant to other independent contractors:

'Article 33 — Non-exclusive contract

This contract is non-exclusive and Carigali reserves the right to engage any other contractor to perform similar or identical services to this contract. Contractor shall afford such other contractors adequate opportunity to carry out their work and shall, if required, accomplish services in co-operation with these contractors and with Carigali.'

(o) Page 75 ABD, Exhibit II referred to in art 2.2: sets out the appellant's 'scope of work' under the contract. The limited scope of work identified therein only covers 'inspection' and 'expediting' services and does not extend to 'management, control or supervision':

'1.1 The work required to be performed under this contract shall be distinguished as follows:

Section 1: Inspection Services
Section 2: Expediting Services

1.2 Work falling under inspection services shall include the performance of inspection services on materials and equipment under procurement by purchase orders from vendors for the purposes of ensuring quality and work falling under expediting services shall include the performance of expediting services which means to say the action taken to ensure the timely delivery of the materials and equipment.

A The inspection of platform jackets and topside structures shall not form part of the scope of work under this contract.

(p) Pages 79-80 ABD, exhibit II to art 2.2 art 2.10.4.(c): shows that Carigali is in charge. The contractor's (appellant's) representative is responsible:

'(C) For the issuance of instructions to contractor's inspection personnel at the direction of Carigali's representative and ensuring their B compliance thereto.'

(q) Page 88 ABD, exhibit III referred to in art 4.1 of the contract (at p 13 ABD), arts 1 and 2: the appellant reports to Carigali's project director and project management team (PMT). Again, this establishes that the appellant had no 'management, control or supervision' of Carigali's business (within the meaning of art II(1)(l) of the DTA):

C '1.0 Communication

All correspondence to contractor shall be to the attention of contractors designated contract representative. All correspondence to Carigali shall be addressed to the project director Peninsular Malaysia Offshore Gas project, PO Box 6150 Pudu, Lot TF 07B, Bukit Bintang Plaza, Kuala D Lumpur, Malaysia.

1.1 Reporting

Contractor shall prepare various status reports, and field trip reports as required by Carigali. The content frequency and distribution of required reports will be determined by the Carigali PMT representative.

E 1.2 Approval of international travel contractor shall obtain Carigali's approval in advance for all international travel.

As I had stated earlier, the provisions set out, taken together, show that the appellant was nothing more than an independent contractor providing 'inspection and expediting services' to PCSB. There was a failure to read the contract as a whole consonant with *Chamber Colliery Co v Twyerould* F (1915) 1 Ch 268 where Lord Watson said at p 272:

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause would be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally G susceptible.

An individual word or an individual clause takes its meaning from the context of the document in which it is found. In *Barton v Fizgerald* (1812) 15 East 530, Lord Ellenborough CJ said:

H > It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.

The failure of the Special Commissioners to read the contract as a whole is an error of law. The nature of work carried out by a project management I contractor is wholly different from that of an independent contractor. The subject matter of the work carried out by a project management contractor would encompass the whole project. In the project, the task of

'management, control or supervision' was performed by PCSB's PMT and not by the appellant. The subject matter with which the appellant was concerned was not the whole project but only an isolated part of it, namely 'inspection and expediting services'.

It will be seen from the express terms of the contract that the services rendered by the appellant were all carried out and performed by the appellant (the Singapore enterprise) outside Malaysia. In this express context, these services may be brought under art XII(4) of the DTA by the very terms of art XII(4) and on the basis that no services were rendered in Malaysia by the appellant, the appellant cannot be liable to tax in Malaysia.

The decision of the Special Commissioners, therefore, is erroneous in law as the Special Commissioners erred in their interpretation of the provisions of the DTA, and the contract (by failing to read the contract as a whole).

The decision of the Special Commissioners is also erroneous in regard to inferences of fact and is erroneous in regard to inferences of mixed fact and law, as thy failed to distinguish between 'project management services' (not carried out by the appellant) and 'inspection and expediting services' (carried out by the appellant). The former may fall within the exclusion to art IV DTA applied by the Special Commissioners whilst the latter would not. In doing so, the Special Commissioners' decision was unsupported by the provisions of the contract and was based on an interpretation of the contract, which could not reasonably be entertained. Again, this arose from a failure to read the contract as a whole.

In the premises, I allowed the appeal with costs and I ordered that the tax withheld be repaid to the appellant.

Appeal allowed.

Reported by Andrew Christopher Simon